Supreme Court, U. S.
FILED
NOV 21 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-746

ATLAS ROOFING COMPANY, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, AND JOHN T. DUNLOP, SECRETARY OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Atlas Roofing Company, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 8, 1975.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears as Appendix A hereto.[1] The order and opinion of the Occupational Safety and Health Review Commission, reported at 3 OSAHRC 19 (1973) is reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1975, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the procedures set up by the Occupational Safety and Health Act of 1970 for administrative

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[1] Simultaneously herewith, a Petition for Certiorari is being filed in the case of *Frank Irey, Jr., Inc. v. O.S.H.R.C.*, seeking review of a Third Circuit en banc decision rejecting the same constitutional claims. *See Frank Irey, Jr., Inc. v. O.S.H.R.C., et al.*, ____ F.2d ____ (Dkt. No. 73-1765, July 24, 1975), Pet. for Cert. No. ____ [hereinafter cited as "Irey Petition"].

Also being filed herewith is a Petition for Certiorari in the case of *Dan J. Sheehan v. O.S.H.R.C.*, Pet. for Cert. No. ____, [hereinafter "Sheehan Petition"] seeking review of the Fifth Circuit's holding rejecting the contention that the OSHA enforcement scheme unconstitutionally deters penalized employers from seeking administrative or judicial review of penalties. *See Dan J. Sheehan v. O.S.H.R.C.*, ____ F.2d ____ (5th Cir., No. 74-2764, October 8, 1975).

enforcement of the Act's civil penalties and administrative definition of the Act's proscriptions violate Article III and the Fifth, and Sixth Amendments to the Constitution because the "civil penalties" and administrative enforcement mechanism are "penal" in nature and effect but omit the constitutional protections required in penal proceedings, including trial by jury.

2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.* (1970), and the relevant provisions of the United States Constitution appear as Appendices to the *Irey* Petition.

STATEMENT OF THE CASE

Petitioner is a roofing subcontractor whose construction site was inspected after a report to the Occupational Safety and Health Commission that one of Petitioner's employees had died on the site. On June 15, 1972, the Secretary issued a citation for one "serious" violation. The proposed "civil penalty" assessed by the OSHA area director for the violation

was $600.00, and a direction that the condition be abated immediately.[2]

In order to prevent the citations from becoming final and unreviewable orders under Section 10 of the Act, Petitioner served a notice of contest within the time period allowed. The Secretary thereafter filed a Complaint with the Occupational Safety and Health Review Commission, and Petitioner filed an Answer denying any violation of the Act. Petitioner moved on August 30, 1972, before the Commission for a jury trial and for "procedural due process", and also moved to dismiss on the grounds that OSHA and its enforcement procedures are unconstitutional. These motions were denied "for lack of jurisdiction."

A hearing was held on the Secretary's Complaint on November 2, 1972, before a hearing examiner of the Occupational Safety and Health Review Commission. The administrative hearing examiner rendered a decision "affirming" the violation and the penalty as well as denying the motion to dismiss. The hearing examiner's decision subsequently became the final order of the Commission under §12(j) of the Act, 29 U.S.C.

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[2]The Act provides that an employer who is cited for a "serious violation" shall be assessed a civil penalty of up to $1,000.00, and an employer whose violation is not "serious" may be assessed a similar civil penalty. 29 U.S.C. §666(b),(c). It defines "serious violation" as one presenting a substantial probability of death or serious physical harm. *Id.* §666(k). A civil penalty of up to $10,000.00 is authorized for willful or repeated violations. *Id.* §666(a). And a criminal sanction of up to $10,000.00 fine and six months' imprisonment is authorized for any willful violation which causes the death of an employee. *Id.* §666(e).

§661(i), because no member of the Commission directed review of the decision within 30 days of its filing. (App. B).

Petitioner Atlas, a resident of the territorial jurisdiction of the Fifth Circuit, filed a timely Petition for Review of the Review Commission's final order on May 30, 1973, pursuant to Section 11(a) of the Act, 29 U.S.C. §660(a).

The Court of Appeals, in an opinion by Chief Judge Brown filed on September 8, 1975, held that the enforcement procedures of the Act did not contravene Article III or the Fifth, Sixth, or Seventh Amendments to the Constitution. (App. A.) The Court "recogniz[ed] the importance as well as the novelty in some cases of Atlas' arguments", (App. A, p. 3), and also recognized that "the existence of both civil and criminal alternatives [in the enforcement mechanism of the statute] does not alone suffice to validate the statute" and that "the absence of any mention of punishment in the legislative history does not immunize the statute from further review." (App. A, p. 12). Nonetheless, the court held that under the tests laid down by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), "taken as a whole, we think that Atlas has failed to demonstrate that Congress meant the statute to reprimand rather than regulate." (App. A, p. 25). The Court also rejected Atlas' contention that even if the penalties are civil in nature, "the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court." (App. A, p. 25).

REASONS FOR GRANTING THE WRIT

1. WHETHER JURY TRIALS ARE CONSTITUTIONALLY REQUIRED IN "CIVIL PENALTY" PROCEEDINGS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT IS A QUESTION OF SUBSTANTIAL NATIONAL IMPORTANCE WHICH IS BEING CONSIDERED BY NUMEROUS COURTS

Petitioner Atlas has exhausted its administrative remedies and now asks this Court to review the merits of its constitutional objections concerning a statute which is probably the most pervasive federal regulatory statute existent today, which statute has not given rise to any previous judgment or opinion of this Court.[3]

In the Court below, the Fifth Circuit recognized "the importance as well as the novelty in some cases of petitioner Atlas' arguments" (App. A, p. 3) and noted regarding the Sixth Amendment jury argument (App. A, p. 6, footnote omitted):

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[3]In the cases of *Lance Roofing Company, Inc., et al. v. Hodgson*, 343 F.Supp. 685 (N.D. Ga.) *aff'd*, 409 U.S. 1070 (1972), and in a case brought simultaneously by Frank Irey, Jr., Inc., petitioner in the companion case (see note 1, *supra*) *Frank Irey, Jr., Inc. v. Hodgson*, 354 F.Supp. 20 (S.D. W. Va.) *aff'd*, 409 U.S. 1070 (1972), the Occupational Safety and Health Act of 1970 was challenged in an action for declaratory judgment and injunctive relief. However, since the *Lance* and *Irey* plaintiffs had filed a Notice of Contest, thus invoking an administrative adjudicative process, the district court held in each case that the plaintiffs must exhaust their administrative remedies by presenting their constitutional objections in the administrative process and seeking judicial review of that process. This Court affirmed, with Mr. Justice Stewart indicating he would have noted probable jurisdiction. 409 U.S. 1070 (1972).

> This issue has importance even beyond the case at hand because the streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of all federal agencies.

The Court went on to state that "the enormous potential effects of a proliferation of OSHA-like enforcement systems are factors that persuade us that we should carefully scrutinize the statute against the case-law experience." App. A, p. 12).[4]

In drafting OSHA, Congress devised a most unusual administrative enforcement procedure. Unlike civil penalty provisions common in other agency statutes, the OSHA procedure gave the agency the full power to adjudicate a violation and to assess a punitive monetary penalty. The adjudication and penalty were made subject only to very limited judicial review.

Faced with the problem of regulating occupational safety, Congress could have created an independent agency with power and procedures similar to those which have been assigned to federal agencies regulating commercial practices, labor relations and fair employment opportunities. It could, in other words, have established an agency – on the model of the Federal Trade Commission, the National Labor Relations Board or the Equal Employment Opportunity Commission –

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[4]The recommendation referred to by the Fifth Circuit (App. A, p. 6, n.11) is set forth in Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1972), pp. 900-901. *See Irey* Petition p.8, note 5.

which would have had the power, subject to judicial review, to conduct hearings and issue orders directing specific compliance with legislative or regulatory standards. In addition, to reinforce that authority where situations required, Congress could have given the agency authority to seek immediate judicial assistance to correct dangerous conditions which present emergency problems (as it has, in fact, done in Section 13 of OSHA).

Instead, in what the three-judge district court in *Lance Roofing Company v. Hodgson*, 343 F. Supp. 685 (N.D. Ga., 1972), *aff'd*, 409 U.S. 1070 (1972), characterized as a "seemingly unique piece of legislation," Congress selected novel procedures and granted plenary powers which raise grave constitutional questions. It vested in the Executive Branch the authority to find violations and levy fines (termed "civil penalties") for past infractions and denied to employers the right to de novo review in district courts or even the right to obtain even limited judicial review of such Executive decisions until they had been considered by a hearing examiner and a review commission. In addition, the statutory scheme chosen by Congress discourages efforts to seek any hearing on the Executive Branch decision by holding over employers' heads the prospect of substantial cumulative penalties for noncompliance with the Executive Branch's order in all cases where the reviewing agency does not affirmatively find employer good faith in invoking its authority. And it further deters such review by permitting the agency to increase the "proposed penalties" even if it finds that review of

the Executive Branch decision was undertaken in good faith.[5]

The most obvious consequence of requiring citizens to comply with these administrative enforcement procedures under OSHA is to subject them to extended and expensive contests of penal fines without affording the traditional requirements of procedural due process guaranteed by the Fifth Amendment, the right to trial by jury, or even the right of jury trial as guaranteed in civil cases under the Seventh Amendment. See *Irey* Petition. If the Secretary's inspectors may use this extended procedure to compel those who take issue with their self-executing citations and penalties to surrender cheaply rather than fight dearly, then the ends of justice will not be served.

If these procedures are constitutionally permissible, it would follow that the Federal Trade Commission – given legislative authority – could impose a substantial self-executing fine for one or several past violations of the Robinson-Patman Act and the National Labor Relations Board could do the same for an unlawful secondary boycott or an improper discharge of an union organizer, as could the Equal Employment Opportunity Commission for unlawful employment practices. And the same agencies might, by parity of reasoning, assess daily penalties (if they are not satisfied of "good faith") for failure to change a practice which is allegedly unlawful during the period that the challenge to that practice is being considered and determined.

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[5] The "chilling effect" features of the Act are the subject of the *Sheehan* Petition.

We demonstrate in the following sections of this petition and in the companion *Irey* and *Sheehan* Petitions that the decisions below present important questions of constitutional law respecting jury rights and procedural due process not previously decided by this Court. These issues also pose vital concerns going to the allocation of power between the judicial and legislative branches of government under Article III of the Constitution. Finally, the questions are presented in a form incontestably ripe for resolution by this Court with no "factual" disputes likely to obscure the constitutional analysis necessary for their disposition.

2. THE "CIVIL PENALTIES" ASSESSED AGAINST PETITIONER ARE PENAL IN NATURE AND THUS CANNOT VALIDLY BE IMPOSED ABSENT THE CONSTITUTIONAL PROTECTIONS OF THE FIFTH AND SIXTH AMENDMENTS

Section 17 of OSHA, 29 U.S.C. §666, provides both civil and criminal penalties for violations of the Act and the regulations promulgated by the Secretary of Labor. The Act in turn requires the employer to furnish a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees", 29 U.S.C. §654(a)(1), and in compliance with the regulations promulgated by the Secretary. 29 U.S.C. §654(a)(2). If the employer willfully violates this requirement and a death results from the violation, the employer can be

criminally prosecuted.[6] If convicted, he can be sentenced to up to 6 months in jail or a $10,000.00 fine, or both. 29 U.S.C. §666(e). The proof required in this criminal action is very similar to that required in an ordinary common law involuntary manslaughter case: the government must show that death resulted from conduct falling below prescribed standards of conduct. *See* PERKINS, CRIMINAL LAW 70-73 (2d ed. 1969).

The practical identity between "civil" and criminal prosecution in terms of impact on a corporate defendant is illustrated by the proceeding in this case. The citation here is for a "serious" violation which resulted in the death of one of the employees of Atlas. During the administrative hearing, the government offered testimony intended to establish that one of Atlas' employees died because of the employer's unlawful course of action in permitting a condition to exist at the construction site and that Atlas knew of the conditions and knew of the serious and homicidal risks entailed by the alleged violation.[7]

The Third Circuit panel in the *Frank Irey* companion case recognized that "there is force and logic to [petitioner's] arguments," and insisted that "we do not dismiss them lightly." The panel also stated that "[i]n the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly

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[6] The statute provides a parallel civil penalty of up to $10,000 for a charge of "willful" violation. 29 U.S.C. §666(a). The Fifth Circuit in this case expressly reserved the question whether a "willful" violation could be the subject of a non-jury "civil enforcement" proceeding. (App. A, p. 23). That issue is squarely presented on the facts of *Irey*. See *Irey* Petition, pp. 4-5, 17-19.

[7] Transcript, pp. 7-38.

for a 'wilful' violation, are far more apparent than any 'remedial' features" (Slip opinion, p. 7). But even after conceding the punitive aspects of OSHA, the panel majority failed to apply the mandate in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), that regardless of its label, if a statute is penal in nature, then citizens must be afforded Fifth and Sixth Amendment procedural safeguards. The majority misconstrued the mandate of *Kennedy v. Mendoza-Martinez* when it stated:

> "In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court considered the question of the criteria to be applied in determining whether sanctions are penal or regulatory in nature. The Court said that in the absence of an expression of congressional intent such factors as scienter, punishment, and excessiveness, inter alia, may be weighed. We do not perform any such analysis here because the congressional intent is clear." (Slip opinion, p. 9).

In *Kennedy v. Mendoza-Martinez, supra*, this Court outlined in some detail the factors that should be considered in determining whether a particular sanction is civil or criminal. 372 U.S. at 168-170. In light of these factors and the factors highlighted in earlier cases, the civil penalties provided under OSHA appear even more clearly criminal in nature.[8]

[8] In the instant case – unlike the Third Circuit in the *Irey* case, see *Irey* Petition, pp. 20-21 – the Fifth Circuit purportedly declined to accord Congress' label a conclusive effect and instead performed the *Mendoza-Martinez* analysis the Third Circuit avoided. *See* App. A, pp. 12-25. But it is by no means clear that the Fifth Circuit did not in fact end up simply according the congressional choice of labels conclusive effect for purposes of judicial review just as in the *Irey* case.

First, the potential penalty is substantial, even though the actual penalty in the case at bar was only $600.00. As Chief Judge Brown noted in the opinion below, "even though monetary penalties do not fit within the conventional definition of disability . . . they do inflict a pocket-book deterence or restraint on the individual." (App. A, p. 13).

Second, the civil penalty here is clearly punitive rather than remedial. Unlike backpay awards in NLRB proceedings or civil penalties in tax cases, the penalty is not designed to compensate the party suffering from the misconduct. It does not provide a remedy for an injured private party or for a specific injury to the government, but rather a punishment for a more general public offense. The OSHA penalty is naked vengeance against a citizen which is devoid of any compensatory

Thus, at a critical point in its application of the *Kennedy v. Mendoza-Martinez* analysis to OSHA – *i.e.*, the examination of the "alternative purpose other than punishment" factor, *see* p.16 *infra* – the Court simply announces "this factor is one which must be carefully restricted" (App. A, pp. 23-24) and, with a citation to the Third Circuit's *Irey* opinion (App. A, p.24 n.50), asks rhetorically what Judges know about the best method of protecting life in industry.

But any deference necessary to congressional expertise in choosing methods to achieve legislative purposes is built into the "rational alternative purpose" factor described in *Kennedy v. Mendoza-Martinez, supra*, 372 U.S. at 169. The question still remains to be answered (and, we submit, is nowhere answered in the Fifth Circuit's opinion): what alternative purpose other than achievement of the legislative goal through punitive measures is rationally ascribable to a system of penalties geared to the identical factors considered by a sentencing judge in a criminal case? To decline to answer that question – on the theory that judges don't understand industry safety needs – is simply to abdicate the function of judicial review of congressional purpose.

purpose. *See Huntington v. Attrill*, 146 U.S. 657, 667 (1892); *Morissette v. United States*, 342 U.S. 246, 256 (1952); 3 BLACKSTONE COMMENTARIES 2 (Lewis ed. 1898).

In addition, the statute specifically directs that in determining the size of the penalty, the Commission should "give due consideration to . . . the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. §666(1). These considerations plainly have nothing to do with compensation of any injured party – they relate directly to the evidence of congressional intent to "let the punishment fit the crime."[9]

The Fifth Circuit opinion confronts directly the essentially "deterent" and "retributive" nature of the OSHA penalty, and – relying essentially on the fact that civil penalties exist in a host of other regulatory statutes (App. A, pp. 15-22 n.43) – reasons that "deterence" may be a legitimate goal of a civil remedial statute.

But in cases such as *Helvering v. Mtichell*, 303 U.S. 391 (1938) the Court specifically relied on the fact that the civil tax penalty had remedial purposes additional to deterence. 303 U.S. at 399-401 and n.3. The penalty – actually an addition to tax due – was provided

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[9] It is clear that in practice as well as in theory, penalties are scaled according to the Secretary's impression of the employer's relative culpability. The Secretary's OSHA Manual prescribes adjustments "by as much as 40% on the basis of degree of the employer's wrongdoing." 77 BNA OSH Rep. 3701-04.

(emphasis added) "primarily as a safeguard for the protection of the revenue *and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.*" *Id.* at 401. This distinction had been the basis on which the Court had declared purported "taxes" to be criminal penalties instead. *See, e.g., Helwig v. United States*, 188 U.S. 605 (1903); *Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. La Franca*, 282 U.S. 568 (1931). It is another step in the analysis entirely to assert that a "penalty" which is in reality addressed *exclusively* to retributive and deterent purposes may thereby be labeled "remedial" or "penal" at the option of Congress for purposes of constitutional classification.

Yet that is precisely the step which the Fifth Circuit takes in this case. Thus, in discussing the question "whether the sanction appears excessive when compared with the alternative purpose assigned" (App. A, p. 24), the Court states:

> While this certainly is a subjective factor, it is one that Atlas' arguments fail to hurdle as well. The remedial functions obviously served by the civil penalties of OSHA may in many circumstances justify imposing the maximum penalties available under the statute. These penalties will often be reduced by the mitigating factors that the imposing agency must consider in assessing the penalty. For example, Atlas' own $600 penalty represents a reduction of $400 after the Secretary had considered the gravity of the offense, the size of the business, the good faith of the employer and the history of previous violations. We cannot say that the penalty is excessive if in the considered judgment of the Administrative Agency it results in improved industrial practices that help to prevent future deaths from falls of employees of Atlas.

What is being described here as "remedial" is a "sentencing" function absolutely identical to that which a federal district judge would perform in deciding the size of a Sherman Act fine for a convicted price fixer. Nowhere does the Fifth Circuit seriously suggest any "remedial" purpose is being pursued in OSHA fines *alternative or in addition to* the purpose of punishing wrongdoers in the hope that they and others like them will obey the law in the future.

Third, the civil penalty is triggered in the case of both willful and serious violations, only on a finding of scienter. As is the case in many criminal actions, the harsher penalty can be imposed only upon a finding of willfulness, while the lesser penalty – for serious violations – requires a showing that the employer knew about, or could, with reasonable diligence, have known about the violations, 29 U.S.C. §666(j).

Fourth, no alternative purpose other than punishment appears evident on the fact of the statute. At the very least, it is clear that the traditional criminal aims of punishment and deterence are the essential purposes of the civil penalty scheme. The seriousness of the violation – and the magnitude of the penalty – vary with the defendant's state of mind and ability to pay. If there is any purpose in such a scheme other than punishment, it is certainly dwarfed to insignificance by the punitive element.

Finally, there is evidence in the legislative history that Congress specifically intended to use the civil penalty as a device to punish criminal conduct. In explaining why civil penalties were used instead of criminal sanctions, Senator Dominick commented:

> . . . We did it this way because I think most of us know how difficult it is to get an enforceable criminal penalty in these type of cases. Over and over again, the burden of proof under a criminal-type allegation is so strong that you simply cannot get there, so you might as well have a civil penalty instead of the criminal penalty and get the employer by the pocketbook if you cannot get him anywhere else. 116 CONG. REC. 37338 (1970).

It is ironic that if Congress had called the civil penalty criminal and had provided for conviction on proof of a preponderance of the evidence and denial of a jury trial, the Fifth Circuit would have struck down the statute in an instant. Petitioner urges this Court to make clear that Congress cannot do indirectly what it so plainly could not do directly.[10]

Suppose Congress in 1968 had chosen to establish an administrative scheme providing a $10,000 penalty for willful interference with a person's civil rights by knowingly creating risks of death or serious injury instead of new criminal penalties. Would the law have been constitutional? Such a statute might have much to commend it as a matter of social policy; local juries could be avoided, speedier justice would be ensured, and great amounts of money would be saved by

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[10] *See also* Hay, *OSHA Penalties: Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974), where the author performs the *Kennedy v. Mendoza-Martinez* analysis and reaches an unequivocal conclusion that the OSHA civil penalty scheme is penal in nature and the constitutional safeguards of the Fifth and Sixth Amendments should be afforded.

avoiding criminal procedures. But criminal protections cannot so readily be discarded. Nor, in the context of this case and employee safety, is it clear that Congress may make such a "policy judgment", *i.e.*, rather than define a new federal "crime" for primary behavior typically punishable as "criminal" and viewed by the community as such, punish the same conduct by a route it thinks speedier, cheaper and less likely to result in "irrational" verdicts.

> Those who wrote our Constitution. . .intended to safeguard the people of this courtry from punishment without trial by duly constituted courts [citation omitted]. And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, [and] must be clearly informed of the charge against him .... *United States v. Lovett*, 328 U.S. 303, 317 (1946).

3. THE COURT BELOW MISREAD AND MISAPPLIED THIS COURT'S SEVENTH AMENDMENT DECISIONS IN DENYING PETITIONER A JURY TRIAL

This issue is analyzed in the companion *Irey* Petition and we respectfully refer the court to the discussion set forth therein, at pp. 10-17.

The Fifth Circuit's opinion adds only a "single red sou" argument to the Third Circuit's analysis (App. A, pp. 25-26):

> That the civil sanction under attack is in the form of a dollar penalty is not a sufficient distinction to deny the power of Congress to prescribe an administrative, as distinguished from a judicial mechanism. To so hold would produce the absurd spectacle of Congress – having full power to prescribe an administrative structure with sanctions of denial or revocation of a life-or-death license (see the large number of such statutes at note 43, *supra*) – being denied the power to prescribe a money fine of a single dollar or for that matter a single red sou.

One might just as well argue that the Seventh Amendment is an "absurd spectacle". However "absurd" it might seem to its detractors, that Amendment does prohibit Congress from allowing a federal district judge to compel a citizen to submit for his sole determination factual disputes involving twenty dollars or more, while allowing Congress to permit the same judge to compel Standard Oil Company to submit to a federal judicial determination of the question whether or not that huge company may even continue to exist. The point is that whatever legitimate control Congress may have under Article III and the Seventh Amendment over the allocation of functions between federal judges, juries, and administrative law judges must rest on the type of sanction or consequence involved, and not on a comparison of severity of possible consequences in individual cases plucked from different categories or types of sanctions.

CONCLUSION

The issues posed in this case and the companion case of *Frank Irey, Jr., Inc. v. O.S.H.R.C., et al.*, are as fundamental as they are controversial;[11] they are also an outgrowth of decisions of this Court such as *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937), and *Helvering v. Mitchell, supra*, decided in the context of very different statutory schemes, but which the lower courts here, with considerable doubt, felt bound to follow in the context of OSHA.

The adjudication of these issues will either set the high-water mark beyond which the enforcement powers of the Executive Branch of government cannot go without providing the constitutional guarantees of jury trial and due process, or it will act as the breach in the dike as the pattern of future legislation, setting off a virtual tidal wave of similar "civil penalty" enforcement procedures. As James Madison once counselled, in reference to the necessity of a separation of the departments of government,

> Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for

[11] Additional academic commentaries on these issues include McClintock & Bohrnsen, *Constitutional Challenges*, 9 GONZAGA L. REV. 361 (1973); Note, *OSHA: Employer Beware*, 10 HOUSTON L. REV. 426 (1973); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Hay, *OSHA Penalties – Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974).

> other pretexts. The first precedent, too, familiarises the people to the irregularity, lessens their veneration for those fundamental principles, and makes them a more easy prey to ambition and self-interest. Hence it is that abuses of every kind, when once established, have been so often found to perpetuate themselves. Letter from James Madison to John Brown, dated August 23, 1785, 2 WORKS OF MADISON 183 (1900).

We submit that the issues are uniquely ripe for this Court's resolution and, before the unusual model of OSHA becomes the rule for the future, an authoritative determination by this Court of those issues is called for.

Respectfully submitted,

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APPENDIX A

ATLAS ROOFING COMPANY, INC., Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR, Respondent.

No. 73-2249.

United States Court of Appeals, Fifth Circuit.

September 8, 1975.

Roofing company filed petition for review of an order of Occupational Safety and Health Review Commission which affirmed a $600 penalty assessment by the Secretary of Labor for a violation of the Occupational Safety and Health Act. The Court of Appeals, Brown, Chief Judge, held that the Act is not a criminal or penal statute and is not defective because it does not provide constitutional protections available in criminal cases; that the Act is not defective because it does not provide for jury trials; that the provision of the Act that allows the Secretary's citation and penalty to become the final order of the Commission in absence of a challenge by the employer does not violate due process; and that the Administrative Law Judge's finding that the roofing company should have known of the presence of the violation was supported by evidence.

Affirmed.

1. Criminal Law ⇐13(1)

Relevant to inquiry of whether a statute is penal or regulatory in character are questions of whether sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote traditional aims of punishment, whether behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

2. Labor Relations ⇐1056

The civil penalties provided for violation of the Occupational Safety and Health Act are not penal in nature and are not invalid because the Act does not provide for the constitutional protections granted by the Constitution in criminal prosecutions. U.S.C.A.Const. art. 3, § 1 et seq.; Amends. 5, 6; Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

3. Constitutional Law ⇐50

There is nothing improper in the election by Congress to impose its own sanctions, civil, criminal or both, without regard to its treatment by other components of our federalism.

4. Labor Relations ⇐1056

Penalty of $600 imposed by Secretary of Labor under the Occupational Safety and Health Act for serious violation of roofing safety regulations which resulted in death of an employee was not excessive where, in the considered judgment of the agency, it would result in improved industrial practices that might help to prevent future deaths from falls of employees. Occupational Safety and Health Act of 1970, §§ 10, 17, 29 U.S.C.A. §§ 659, 666.

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5. Labor Relations ⇐7

The focus of the Occupational Safety and Health Act, the control of jobsite safety practices and health conditions, has a demonstrable and legitimate government concern and the fact that the civil enforcement sanctions are inherently disabilities does not alter the nature of the congressional purpose. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

6. Jury ⇐31(2)

The Occupational Safety and Health Act is not defective because it does not provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the district court. U.S.C.A.Const. Amend. 7; Occupational Safety and Health Act of 1970, §§ 10, 17, 29 U.S.C.A. §§ 659, 666.

7. Constitutional Law ⇐275(2)

Employers are not denied due process because Occupational Safety and Health Act vs citation and penalty issued by the Secretary of Labor to become the final order of the Occupational Safety and Health Review Commission in the absence of a challenge by the em- U.S.C.A.Const. Amend. 5; Occupational Safety and Health Act of 1970, § 10(b), 29 U.S.C.A. § 659(b).

8. Constitutional Law ⇐42.1(5)

Where employer was not penalized by provisions of the Occupational Safety and Health Act which granted the agency authority to increase penalty under certain conditions or to cumulate penalties under certain conditions, employer did not have standing to challenge those aspects of the Act. Occupational Safety and Health Act of 1970, § 17(d), 29 U.S.C.A. § 666(d).

9. Labor Relations ⇐7

Roofing company's use of two bundles of insulation material of the same type then being laid over the roof to cover hole in roof did not satisfy requirement of Occupational Safety and Health Regulation that roof opening covers be so installed as to prevent accidental displacement. Occupational Safety and Health Act of 1970, § 17(b, j, *l*), 29 U.S.C.A. § 666(d, i, k).

10. Labor Relations ⇐27

Substantial evidence supported finding of Administrative Law Judge for the Occupational Safety and Health Review Commission that there was a "serious violation" of regulation governing roof hole coverings and that roofing company should have known of the presence of the violation of the regulation which resulted in the death of an employee. Occupational Safety and Health Act of 1970, § 17(b, *l*), 29 U.S.C.A. § 666(b, k).

Petition for review of an order of the Occupational Safety and Health Review Commission (Georgia case).

Before BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Atlas Roofing Company petitions this Court to review an order of the Occupational Safety and Health Review Commission (OSHRECOM)[1] affirming a $600.00 penalty assessed by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHA).[2] Specifically Atlas was cited for violation of 29 C.F.R. 1926.500(f)(5)(ii) for failing to adequately cover roof openings that resulted in the death of one of its employees. Petitioner challenges the order not only on the issue of substantive compliance with the regulation, but also on the grounds that the basic structure of OSHA is constitutionally defective because (1) the civil penalties under OSHA are really penal in nature and call for the constitutional protections of the Sixth Amendment and Article III (2) even if found to be a civil penalty, OSHA violates the Seventh Amendment because of the absence of a jury trial, and (3) this is a denial of the Fifth Amendment right to a "prejudgment" due process hearing, since under OSHRECOM orders are self-executing unless the employer affirmatively seeks review. While we recognize the importance as well as the novelty in some cases of Atlas' arguments, we disagree with these contentions and affirm.

I. In The Beginning

At 9 a. m. on June 6, 1972 Johnny Boseman, a temporary employee of Atlas Roofing Company, was fatally injured when he fell through a 3′ x 3′ ventilation bay set in the roof of an unfinished warehouse to the concrete floor 30 feet below. Boseman's death initiated an inspection by the Department of Labor and as a result, Atlas, his employer and the subcontractor for the project, was cited for a "serious" violation[3] of OSHA for failing to maintain an adequate cover or railing around the exposed roof bay.[4] Atlas was directed to correct the violation immediately and pay a $600.00 penalty. In response, Atlas chose to contest the citation and proposed penalty by way of the statutory review procedure.[5]

1. As this is obviously going to be a fruitful source of Court of Appeals litigation, acronyms will be a handy tool. But they are better if they are readily pronounceable. So we have added to the initials the suffix ECOM to read OSHRECOM.

2. 29 U.S.C.A. § 651 et seq.

3. **§ 659. Enforcement procedures—Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice**

(a) If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

§ 666. Civil and criminal penalties

(b) Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pur-

4, 5. Notes 4 & 5 on page 7648.

In the hearing before the Review Commission Administrative Law Judge (ALJ), Atlas denied that it had violated the regulations and raised as additional defenses the contentions that the enforcement procedures of OSHA were unconstitutional.[6]

Limiting his decision to Atlas' factual arguments only, the ALJ concluded that the applicable regulation required employers to provide guardrails around roof openings and, absent those, a cover that was "so installed as to prevent accidental displacement."[7] In view of this requirement, the ALJ concluded that Atlas had failed to show that the insulation material—of the same nature that was being used for the roof covering—met the requirements of the applicable standard. The proposed $600.00 penalty was adjudged to be an appropriate and reasonable one.

Subsequently, Atlas filed a petition to seek discretionary review by OSHRECOM itself.[8] Because no member of the Commission requested that the decision of the ALJ be reviewed, this decision became the final order of the Commission 30 days later on May 7, 1973. Thereafter Atlas petitioned for review of this order in the Court of Appeals and moved for and was granted a stay of the penalty by the Commission.[9]

suant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

4. The safety standard said to be violated was 29 C.F.R. 1926.500 that read:

(b) *Guarding of floor openings and floor holes.* (1) Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

and (F)

(5) Floor opening covers shall be of any material that meets the following strength requirements:

(i) Cr[illegible]its, trenches, and manhole covers and th[illegible]upports, when located in roadways, [illegible]vehicular aisles, shall be designed to carry a truck rear-axle load of at least 2 times the maximum intended load;

(ii) The floor opening cover shall be capable of supporting the maximum intended load and so installed as to prevent accidental displacement.

5. 29 U.S.C.A. § 659(a), *supra*

6. Prior to the administrative hearing, petitioner filed a jury trial demand and requested that it be accorded other rights incidental to criminal proceedings. At the same time Atlas moved to dismiss the complaint on the grounds that the enforcement procedures of the Act were unconstitutional. The ALJ, interpreting petitioner's motion as a challenge on Fifth, Sixth, and Seventh Amendment grounds, denied these motions for an assumed lack of power in OSHRECOM to pass on constitutional issues.

7. 29 C.F.R. 1926.500(f)(5)(ii).

8. 29 U.S.C.A. § 661(i).

Hearing examiner; determination; report as final order of Commission

(i) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

9. 29 U.S.C.A. § 660(a).

§ 660. Judicial review—Filing of petition by person adversely affected or aggrieved; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; appropriate relief; finality of judgment

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28. Petitions filed under this subsection shall be heard expeditiously.

29 C.F.R. 2200.92, as revised, 37 F.R. 20237, 20242.

Stay of final order

(a) Any party aggrieved by a final order of the Commission may, while the matter is within the jurisdiction of the Commission, file a motion for a stay.

(b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(c) The Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

II. The Constitutional Challenges

When Is A Penalty A Fine?

One of petitioner's strongest points is that OSHA crosses that elusive line between criminal fines—that of necessity require the Sixth Amendment protections—and civil regulatory sanctions—that are left to fall back upon the more amorphous protections of due process. These distinctions are elemental in our legal tradition,[10] but where a statute such as OSHA contains both monetary fines and penalties for conduct that are perhaps only arguably different in quality, the distinction becomes ambiguous in-

10. *Huntington v. Attrill*, 1892, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123, 1133; *Wisconsin v. Pelican Ins. Co.*, 1887, 127 U.S. 265, 8 S.Ct. 1370, 32 L.Ed. 239, 243; *Passavant v. United States*, 1892, 148 U.S. 214, 13 S.Ct. 572, 37 L.Ed. 426; *Bartlett v. Kane*, 1853, 16 How. 263, 14 L.Ed. 931.

deed. The distinctions are additionally blurred when Congress applies both types of enforcement measures to impose standards and regulate conduct in a relatively new arena such as employment safety and health. That is precisely the problem we consider here.

This issue has importance even beyond the case at hand because the streamlined enforcement procedure embodied in OSHA, although presently prescribed in only a few instances, has been recommended as a blueprint for a major revision of the enforcement systems of *all* federal agencies.[11] Therefore, in view of

11. Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies Report to the Administrative Conference of the United States (1972), pp. 900–901.

Professor Goldschmid has recommended and the Administrative Conference of the United States has adopted the recommendation that federal agencies increase their use of civil money penalties as an alternative to other remedies such as license revocation proceedings in an effort to make their enforcement procedures more flexible and effective.

The present system may also be allowing some of the worst offenders (who will not settle and cannot feasibly be brought to trial) to get away. Even when cases are carried forward, serious enforcement problems are often created by excessive delay. The FAA, for example, recently protested to the Department of Justice about cases involving "the question of safety in air transportation," in which "processing is of great importance," which were being subjected to "excessive delays."

From the standpoint of alleged offenders, the present system is unsatisfactory because, as a practical matter, they are often denied procedural protections and an impartial forum, and may be forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. When, for example, the Bureau of Customs seizes $1,900 worth of goods can an alleged offender—no matter how much he believes in his case—afford to litigate in federal district court rather than settle for $1,200?

Of course, many of the settlements offered by agencies are perfectly fair. But there is every reason to provide an impartial forum and procedural protections *for those few* who wish to question a proposed imposition. The possibilities for arbitrariness, lack of consistency, and discriminatory exercises of authority are unnecessarily accentuated under the present system.

Especially where relatively small sums are involved, the realistic choice is either (i) to provide that *very small percentage* of alleged offenders who wish to litigate (or the agency itself in an equally small number of instances) an opportunity for speedy and inexpensive adjudications under an administrative imposition scheme, or (ii) to deny (on the basis of the theoretical availability of *de novo* judicial review) both sides an impartial forum altogether. For most money penalty cases, the opportunity for a speedy and inexpensive adjudication is basic to a just imposition scheme. Factors whose presence tend to commend the imposition of civil money penalties by agencies themselves are set forth in Part B of the recommendation.

The administrative imposition system proposed would, at the option of either party, provide for an adjudicative proceeding, on the record, pursuant to Sections 5–8 of the Administrative Procedure Act, 5 U.S.C. §§ 554–57 (1970). Agencies are urged to adopt rules of practice which will maximize the possibility of securing just, inexpensive, and speedy adjudications. An agency's decision would be final unless appealed within a stipulated number of days. If an appeal is taken to a United States Court of Appeals, an agency's decision would be sustained if supported by substantial evidence.

An adjudicative proceeding would, of course, prohibit a commingling of adversarial and decisional functions. It is expected that substantial evidence review will be an ultimate, though seldom used, protection against abuse. Procedures for settlement by means of remission, mitigation and compromise would, of course, be retained. Administrative imposition is intended to bring fairer, not necessarily fewer, settlements.

See also footnote 43, *infra*.

the importance of the issue, we analyze it here in terms of (i) the criminal and civil enforcement procedures of OSHA, (ii) the congressional intent discernible from the face of the statute and the legislative history and (iii) the multiple test espoused by the Supreme Court in *Kennedy v. Mendoza-Martinez*.[12]

12. 1963, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644.

13. 29 U.S.C.A. §§ 651, 652(5), 653(a).

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the full responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health

The Enforcement Structure of OSHA

Designed with the ambitious but socially laudable goal "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," [13] OSHA applies to all work-

Note 13—Continued

laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problems;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

§ 652. Definitions

For the purposes of this chapter—

(1) The term "Secretary" mean[1] the Secretary of Labor.

(2) The term "Commission" means the Occupational Safety and Health Review Commission established under this chapter.

(3) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

(4) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

(7) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.

(11) The term "Committee" means the National Advisory Committee on Occupational Safety and Health established under this chapter.

(12) The term "Director" means the Director of the National Institute for Occupational Safety and Health.

(13) The term "Institute" means the National Institute for Occupational Safety and Health established under this chapter.

(14) The term "Workmen's Compensation Commission" means the National Commission on State Workmen's Compensation Laws established under this chapter.

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal Laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

(a) This chapter shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this chapter by the courts established for areas in which there are no United States district courts having jurisdiction.

ers employed in businesses that affect interstate commerce.[14]

To accomplish this vast objective, Congress passed a labor safety standards form of administrative program. Under OSHA, the Secretary of Labor (Secretary) is vested with the power to both promulgate and enforce compliance with the safety standards set for individual industries throughout the country. As enforcement measures, OSHA provides for both civil and criminal penalties. The Justice Department prosecutes employers in federal district court when job conditions are deemed to warrant criminal prosecution, but the Secretary enforces the civil penalties before the autonomous forum of the OSHRECOM.[15] Since Atlas challenges these specific civil enforcement procedures on the grounds that they violate Article III and the Fifth, Sixth and Seventh Amendments, close scrutiny of the nature and process of civil censure under these provisions is necessary.

The enforcement procedures of OSHA have three stages—citation, administrative hearing, and court review. Each stage is distinct because unless the employer initiates the next level of review, the penalty becomes final and unreviewable.

The citation procedure begins when an inspector, acting in response to a complaint or on his own investigation, determines that the employer has violated either a specific safety standard or the general duty provision requiring the employer to provide a safe working environment.[16] The citation given by the inspector lists the nature of the violation as well as the time set for abatement.[17]

14. President Johnson in 1968 proposed the first comprehensive occupational health and safety program. S. 2,864, 90th Cong., 2nd Sess. (1968). (Senator Yarborough introducing the Administration's proposal). *See also Bureau of National Affairs, Job Safety and Health Act of 1970*, at 16 (1971).

15. Id. § 661.

§ 661. Occupational Safety and Health Review Commission—Establishment; membership; appointment; Chairman

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

16. Id. § 654.

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

See also the discussion by Chief Judge Gibson regarding the specific industrial standards in *American Smelting and Refining Co. v. Occupational Safety and Health Review Commission*, 8 Cir., 1974, 501 F.2d 504.

17. Id. § 658.

§ 658. Citations—Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations

(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness is-

Within a reasonable time thereafter, the Secretary shall assess and notify the employer of the penalty, if any, that will itself be based on the nature of the violation. For initial violations of OSHA an employer may be subject to a $10,000 penalty for either (1) willful violations[18] or for violations that are determined to be serious,[19] i. e., " • • • [have] a substantial probability that death or serious harm could result from a condition that exists • • • unless the employer did not, and could not with the exercise of due diligence know of the presence of the violation."[20]

Alternatively, criminal proceedings may be triggered by conditions that the Secretary considers both willful and serious and the employer shall upon conviction be subject to a fine of up to $10,000 and six months in jail.[21]

sue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

Posting

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

Time for issuance

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

18. Id. § 666(a)–(c).

§ 666. Civil and criminal penalties

(a) Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

19. Id. § 666(b).

20. Id. §§ 666(b) and (j).

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

21. Id. § 666(e)–(g).

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

On receipt of the Secretary's citation, an employer has 15 days to notify the Secretary that he intends to challenge the penalty[22] or the penalty becomes final and unreviewable. Once such a challenge is made, the Secretary is required to initiate the administrative hearing by notifying OSHRECOM.[23] The ALJ conducts a full hearing[24] and thereafter makes a report that will itself become the final decision of OSHRECOM unless the parties seek and the Commission grants discretionary review.[25]

Thereafter the final stage is review in the Court of Appeals and thereafter the

22. Id. § 659(a).

23. Id. § 659(c).

Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

The Secretary's notification to OSHRECOM of the employer's intention to contest is denominated a formal "complaint" in the record below.

24. Id. § 661(i) and 29 C.F.R. § 2200.72 (1973).

Hearing examiner; determination; report as final order of Commission

(i) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

29 C.F.R. § 2200.72 (1973) directs that hearings before the OSHRECOM and its ALJs shall be in accordance with the Administrative Procedure Act, 5 U.S.C.A. § 554 (1967) and the Federal Rules of Evidence shall be applicable.

25. 29 U.S.C.A. § 661(i) (1974); 29 C.F.R. § 2200.91, as revised, 37 F.R. 20237, 20242. In the case of Atlas since no member of the Commission directed that the decision of the ALJ be reviewed, it became final on May 7, 1973.

discretionary review by the Supreme Court.[26] The Court of Appeals review is on the APA substantial-evidence-on-the-record-considered-as-a-whole-standard. The Court, however, may direct the Commission to consider additional evidence if it is found that the evidence is both material and reasonable grounds existed for the failure to admit it in the hearing before the Commission.[27]

One additional feature of OSHA that Atlas sharply contests is § 659(b). This provision allows the Secretary retroactively to assess an additional non-abatement penalty for each day following the expiration of the initial abatement period whenever he determines that the employer did not initiate the review procedures (either before the Commission or the Court of Appeals) in good faith or did so only in order to avoid the penalties imposed.

On The Face Of OSHA

The Government argues that OSHA successfully survives the Atlas Sixth Amendment attack because the provisions for civil and criminal enforcement specified in the statute are precise and distinct and, additionally, because the legislative history clearly demonstrates that Congress purposefully chose remedial rather than punitive consequences to accompany the civil provisions. The Government naturally stresses the long accepted maxim that Congress may use either civil or criminal measures to control similar conduct. But although Congress has enormous flexibility in the selection of enforcement measures, the existence of both civil and criminal alternatives does not alone suffice to validate the statute.[29] Similarly, the absence of any mention of punishment in the legislative history does not immunize the statute from further review.[30] Although acknowledging the seriousness of the potential penalties the one court that has presently considered these challenges to the statute has upheld it.[30]

The criticism elicited by the statute,[31] and the enormous potential effects of a proliferation of OSHA-like enforcements systems are factors that persuade us that we should carefully scrutinize the statute against the case-law experience.

Functional Analysis Of Congressional Intent

[1, 2] The starting place is the Supreme Court's decision in *Kennedy v. Mendoza-Martinez*[32] to test Congressional intent and permissible Congressional latitude in prescribing civil rather than criminal consequences.

26. See 29 U.S.C.A. § 660(a). The only provision for District Court participation in the imposition of civil penalties under OSHA is contained in 29 U.S.C.A. § 666(k). If not administratively collected, the Secretary may bring an action in the District Court to recover the civil penalties imposed by the Commission, but there is to be no relitigation of the question of liability or the amount of the civil penalty itself.

27. 29 U.S.C.A. § 660(a).

28. See *Lipke v. Lederer*, 1922, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061, 1065.

29. *Trop v. Dulles*, 1957, 356 U.S. 86, 94, 78 S.Ct. 590, 2 L.Ed.2d 630.

30. See *Frank Irey, Jr., Inc. v. OSHA*, 3 Cir., 1974, — F.2d — [rehearing en banc granted, Dec. 20, 1974]. On the eve of filing our opinion the Court en banc sustained the panel, holding the Act valid against Seventh Amendment attacks. — F.2d — [July 24, 1975]

31. *See* Hay, OSHA Penalties: Some Constitutional Considerations, 10 Idaho L.Rev. 223 (1974); 10 Hous.L.Rev. 426, 437 (1973).

32. 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644.

The Court summed up the factors:

[I] Whether the sanction involves an affirmative disability or restraint, [II] whether it has historically been regarded as a punishment, [III] whether it comes into play only on a finding of scienter, [IV] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [V] whether the behavior to which it applies is already a crime, [VI] whether an alternative purpose to which it may rationally be connected is assignable for it, and [VII] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[33]

[I] "Whether the sanction involves an affirmative disability or restraint." This first test gives some weight to Atlas' arguments because even though monetary penalties do not fit within the conventional definition of disability,[34] i. e., want of legal capability, they do inflict a pocket-book deterrence or restraint on the recipient.

[II] "Whether the sanction has historically been considered a punishment."[35] This is of little aid to Atlas. While it is true, as Atlas argues, that fines have long been used as an alternative punishment, that argument, when used here, begs the question for civil monetary penalties have in a similar manner long been accepted where they served a remedial rather than a punitive function.[36] And we come full circle again to the question of the remedial function of the Act.

[III] "Whether the sanction is activated only upon a finding of scienter." This gives Atlas little support for its ar-

33. Id. at 168, 83 S.Ct. at 568. Bracketed numbers have been inserted for ease of reference.

34. For factor [I] the Supreme Court cited: *Ex parte Garland*, 1866, 4 Wall. 333, 377, 18 L.Ed. 366, 369 (exclusion from practice of law in the courts of the United States); *United States v. Lovett*, 1946, 328 U.S. 303, 316, 66 S.Ct. 1073, 90 L.Ed. 1252, 1259 (denial of federal employment); *Flemming v. Nestor*, 1960, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435, 1448 (denial of a non-contractual government benefit held not to be a punishment).

35. For factor [II] the Supreme Court cited: *Cummings v. Missouri*, 1866, 4 Wall. 277, 320-21, 18 L.Ed. 356, 362 (disqualification from lawful advocation as a clergyman held to be punishment); *Ex parte Wilson*, 1885, 114 U.S. 417, 426-29, 5 S.Ct. 935, 29 L.Ed. 89, 92 (imprisonment at hard labor held to be infamous punishment necessitating the right to grand jury indictment); *Mackin v. United States*, 1886, 117 U.S. 348, 350-52, 6 S.Ct. 777, 29 L.Ed. 909-911 (imprisonment and hard labor held to be infamous punishment); *Wong Wing v. United States*, 1896, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (imprisonment and hard labor).

36. *Trop v. Dulles*, 1958, 356 U.S. 86, 96-97, 78 S.Ct. 590, 595, 2 L.Ed.2d 630, 640.

But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[30] The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote.[31] If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.

gument. While § 666(b), the provision under which Atlas was cited, appears superficially to be a "strict liability" provision imposing a mandatory penalty whenever an employer is cited for a serious violation, an employer may defend against such a charge on the grounds that he "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."[37] Of course, the fact that OSHRECOM may consider the good faith of the employer and previous violations in determining the appropriateness of the assessed civil penalty[38] does not orbit to the apogee of a suspected scienter factor.

But this is not a requirement analogous to the criminal law concept embraced in the conclusory "scienter" concept. The employer has a defense if he did not nor should not have known. But this is a far cry from limiting his obligations to situations in which he knowingly and intentionally acted or refrained from acting. The statute itself expressly distinguishes between acts which on usual tort principles are charged to employers and those willfully done.[39]

[IV] "Whether the statute promotes the traditional aims of punishment, retribution and deterrence."[40] This lends some weight to both sides. In Atlas' favor, retributive effect may be seen in the statutory provisions that civil penalties shall be assessed according to the gravity of the violation.[41] Similarly, OSHA may be said to have a deterrent effect in the sense that the penalties assessed against the employers compel compliance with the safety standards.

But the government argues that deterrence is not the function solely of a criminal statute. It contends that "remedial" means not only compensatory but a kind of prospective deterrence of a means to encourage compliance with the government regulation. As examples it cites the extensive series of cases flowing from the seminal *Oceanic Steam*

37. 29 U.S.C.A. § 666(j).

Of the two other civil penalties allowed for initial violations, one § 666(a) permits citation for willful violations and the other § 666(c) permits penalties for non-serious violations irrespective of scienter.

38. 29 U.S.C.A. § 666(i).

39. See *American Smelting & Refining Co. v. Occupational Safety & Health Commission*, 8 Cir., 1974, 501 F.2d 504. We intimate no view on the status of a "willful" charge as criminal or civil.

40. The Supreme Court cited for [IV] factor: *United States v. Constantine*, 1935, 296 U.S. 287, 295, 56 S.Ct. 223, 80 L.Ed. 233, 238 (a purported "special excise tax" assessed against those retail liquor dealers doing business contrary to the local state or municipal law held to be a penalty for unlawful liquor sale rather than a tax); *Trop v. Dulles*, 1958, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630, 641, 648–49 (penalty of expatriation for servicemen who deserted during time of war held to be a punishment).

41. 29 U.S.C.A. § 666(i). See also 10 Hous.L.Rev. at 442 where the author argues that in addition to the commission's powers to consider the gravity of the offense in assessing penalties, retributive effect is discernable in OSHA because it provides two penalties where the identical behavior results in varying degrees of harm. But, while it is true that §§ 666(a) provide for civil penalties for willful violations and 666(e) does provide for criminal penalties if death occurs, one is not compelled to draw a comparison between a criminal and a civil sanction for the purpose of determining whether the entire statute has a retributive effect. It is entirely proper for a criminal sanction to have a retributive effect and similarly it is only to be expected that Congress would conclude that a statutory scheme should be designed to impose upon the more serious conduct criminal rather than civil penalties alone.

Navigation Co. v. Stranahan[42] for the proposition that the government may appropriately assess monetary penalties by administrative enforcement as a function of its absolute power—within Constitutional limits—to control matters within the competence of the National sovereign. While these cases involve specific areas that have traditionally been considered the exclusive province of the federal government, such as tariffs and immigration, the government properly argues that there is no reason for so limiting their application. In support of this the government cites numerous statutes permitting civil penalties to be imposed by the administrative agency for violations of its regulation or orders.[43]

42. 1909, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013; *Lloyd Sabaudo Societa v. Elting*, 1932, 287 U.S. 329, 333–35, 53 S.Ct. 167, 77 L.Ed. 341; *Elting v. North German Lloyd*, 1932, 287 U.S. 324, 53 S.Ct. 164, 77 L.Ed. 337; *Hepner v. United States*, 1909, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720; *Passavant v. United States*, 1893, 148 U.S. 214, 13 S.Ct. 572, 37 L.Ed. 426; *Bartlett v. Kane*, 1885, 16 How. 263, 14 L.Ed. 931.

43. The appendix to Professor Goldschmid's Report (see footnote 11, *supra*) is instructive on the issue.

EXHIBIT 1
to
APPENDIX A

Illustrative Catalogue of Statutory Provisions Pursuant to Which Federal Administrative Agencies (or the Courts) Impose Civil Money Penalties

Agency-Citation	Purpose	Penalty
Executive Departments—Agriculture:		
7 U.S.C. § 1314(a) (1970).	Marketing of tobacco in excess of marketing quota.	75% of average market price of tobacco for preceding year.
7 U.S.C. § 1340(2) (1970).	Marketing of wheat in excess of marketing quota.	65% of parity price per bushel of wheat.
7 U.S.C. § 1346(a) (1970).	Marketing of cotton in excess of marketing quota.	50% of parity price per pound of cotton.
7 U.S.C. § 1356(a) (1970).	Marketing of rice in excess of marketing quota.	65% of parity price per pound of rice.
7 U.S.C. § 1359(a) (1970).	Marketing of peanuts in excess of marketing quota.	75% of the support price for peanuts.
7 U.S.C. § 1155(a) (1970).	Sugar knowingly marketed or imported in excess of sugar quotas.	Three times market value of the sugar.
7 U.S.C. § 1155(b) (1970).	Sugar imported and processed as raw sugar which is determined to be direct-consumption sugar.	$0.01 per pound in excess of direct-consumption sugar quota.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Agriculture— Continued		
7 U.S.C. § 1433 (1970).	Misuse of feed intended to relieve distress or preserve foundation herds.	Market value of the feed involved.
7 U.S.C. § 1379i(a) (1970).	Failure to conform to the Secretary's requirements for domestic wheat marketing certificates, export marketing certificates, or other required certificates.	Twice the face value of the marketing certificates.
7 U.S.C. § 610(c) (1970).	Willful disclosure of confidential marketing information.	$100.
7 U.S.C. § 499c(a) (1970).	Failure of broker to obtain license.	Up to $500 each offense; up to $25 for each day it continues.
45 U.S.C. §§ 73, 74 (1970).	Failure to properly care for animals in transit.	$100–$500.
7 U.S.C. § 1596(b) (1970).	Violation of provisions of Federal Seed Act.	$25–$500.
7 U.S.C. § 203 (1970).	Failure to register stockyard.	Up to $500/each offense, up to $25 for each day it continues.
7 U.S.C. § 207(g) (1970).	Failure to comply with rate provisions, regulations or orders.	Up to $500/each offense, up to $25 for each day it continues.
7 U.S.C. § 215(a) (1970).	Failure to obey Secretary's order concerning rates discrimination or deceptive practices.	$500/each offense.
7 U.S.C. § 2149(a) (1970).	Animal Welfare Act of 1970.	$500/each offense.
15 U.S.C. § 1825(a) (1970).	Horse Protection Act of 1970.	$1000/each offense.
Commerce:		
a. FTZB: 19 U.S.C. § 81S [81s] (1970).	Foreign Trade Zones	Up to $1000.
b. BIC: 50 U.S.C. § 2405(c) (1970).	Violation of provisions or regulations concerning import control.	Up to $1000.
c. NOAA:		
16 U.S.C. § 772f (1970).	Records and reports	$50/each violation.
16 U.S.C. § 957(d) (1970).	Knowingly shipping, transporting, etc., any fish taken or retained in violation of regulations.	(1) Up to $25,000 for the first violation, (2) up to $50,000 for subsequent violations.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Commerce— Continued		
16 U.S.C. § 957(e) (1970).	Failure to keep statistical records, etc.	(1) Up to $1,000 for the first violation; (2) up to $5,000 for subsequent violations.
16 U.S.C. § 957(f) (1970).	Importation of certain species of fish contrary to regulation.	Up to $100,000.
16 U.S.C. § 989(o) (1970).	Violation of any provision of or regulation under N.W. Atlantic Fisheries Act.	(a) Up to $500 for the first violation (b) up to $1000 for subsequent violations.
d. MA: 46 U.S.C. §§ 808, 835 (1970)	Violation of Shipping Act	Money penalty in lieu of forfeiture from $500 to $1000.
Interior:		
18 U.S.C. § 43(c) (1970).	Transportation of wildlife taken in violation of State, national, or foreign laws.	Up to $5000 for each violation.
30 U.S.C. § 819(a) (1) (1970).	Violations of coal mine health and safety standards.	Up to $10,000 for each violation.
30 U.S.C. § 819(a) (2) (1970).	Willful violation of standards relating to smoking.	Up to $250.
Justice:		
a. BNDD: 21 U.S.C. § 842 (1970).	Unlawful distribution of a controlled substance, failure to keep records, unlawful use of seal placed on such substances.	Up to $25,000.
b. INS:		
8 U.S.C. § 1221(d) (1970).	Failure of manifests for shipments or aircraft to comply with the requirements of this section.	$10 per person not included in the manifest.
8 U.S.C. § 1223(c) (1970).	Failure to comply with provisions concerning examination upon arrival.	Cost of maintenance including detention expense; $300 for each violation.
8 U.S.C. § 1227(b) (1970).	Failure to provide immediate deportation of aliens excluded from admission (or entering in violation of law).	Same as above.
8 U.S.C. § 1229 (1970).	Violation of any regulation concerning ports of entry for aliens arriving by aircraft.	$500.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Justice— Continued		
8 U.S.C. § 1253(c) (1970).	Deportation proceedings within 5 years after the entry of the alien for causes existing at time of arrival.	Cost of deportation to owner of vessel.
8 U.S.C. § 1281(d) (1970).	Failure to deliver true and accurate list of alien crewmen.	$10 for each alien not reported.
8 U.S.C. § 1284(a) (1970).	Failure to detain alien crewman until an immigration officer has inspected the crewman.	$1000 for each failure.
8 U.S.C. § 1285 (1970).	Employment on passenger vessels or aircraft of aliens afflicted with certain disabilities.	$50 for each alien.
8 U.S.C. § 1286 (1970).	Unlawful discharge in United States of alien crewman.	$1000 for each violation.
8 U.S.C. § 1321 (1970).	Failure to prevent the unauthorized landing of aliens.	$1000 for each violation.
8 U.S.C. § 1322(a)(b) (1970).	Bringing in aliens subject to disability or afflicted with certain diseases.	$1000 or $250 depending on the alien's condition.
8 U.S.C. § 1323(a)(b) (1970).	Unlawful bringing of aliens into United States.	$1000 for each violation.
8 U.S.C. § 1287 (1970).	Intent to evade immigration laws or bring alien crewmen into United States with intent to evade immigration laws.	Up to $5000 each violation.
Labor with OSHRC: 29 U.S.C. § 666 (1970).	Occupational safety and health:	
	(a) willful or repeated violations.	(a) up to $10,000.
	(b) other violations.	(b) up to $1,000.
Transportation:		
a. NHTSA: 15 U.S.C. § 1398(a) (1970).	Failure to comply with safety standards.	Up to $1,000 for each violation and $400,000 per related series of violations.
b. FAA: 49 U.S.C. § 1471(a)(1) (1970).	Violation of provisions and regulations.	Up to $1,000 for each violation.
c. FRA:		
45 U.S.C. § 64a(a) (1970).	Hours of service	$500 for each violation.
45 U.S.C. §§ 6, 13 (1970).	Safety appliance.	$250 for each violation.
45 U.S.C. § 34 (1970).	Locomotive inspection.	$250 for each violation.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments— Continued		
Transportation— Continued		
49 U.S.C. § 27 [26] (h) (1970).	Signal inspection.	$100 for each violation and $100 for each day violation continues.
45 U.S.C. § 438(b) (1970).	Violation of provisions and regulations.	$250–$2,500; each day considered a separate violation.
d. USCG:		
33 U.S.C. § 157a (c) (1970).	Navigating or operating a vessel under bridges in violation of regulations.	Up to $500.
33 U.S.C. § 158 (1970).	Penalty for violations of chapter 3 (navigation rules for harbors, rivers, and inland waters) by pilot, engineer, mate, or master.	Up to $500.
[The USCG enforces 85 other civil money penalty provisions.]		
e. FHWA: 49 U.S.C. § 322(h) (1970).	Violation of various motor carrier safety regulations by certain motor carriers.	$500 for each offense and up to $250 for each additional day.
Treasury:		
a. IRS:		
Internal Revenue Code § 6651(a).	Failure to file tax return or to pay tax.	0.5%–25%.
Internal Revenue Code § 6652.	Failure to file certain information returns.	$1–$25,000.
Internal Revenue Code § 6653(a)(b).	Failure to pay tax through:	
	(1) negligence	(1) 5% of underpayment.
	(2) fraud	(2) 50% of underpayment.
[The IRS enforces 18 other civil money penalty provisions.]		
b. Customs:		
19 U.S.C. § 292 (1970).	Failure to file manifests going to or leaving place where there is no custom house.	$20 each offense.
19 U.S.C. § 469 (1970).	Dealing in or using empty stamped imported liquor containers.	$200 for each cask.
[Customs enforces 33 other civil money penalty provisions.]		
c. ODGSO: 31 U.S.C. § 443 (1970).	Acquisition and use of gold in violation of law.	Twice the value of the gold and forfeiture, seizure and condemnation of property.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments—Continued		
Independent agencies:		
AEC: 42 U.S.C. § 2282 (1970).	Violations of licensing requirements.	Up to $5,000 for each violation to a maximum total penalty of $25,000 within 30 days.
CAB: 49 U.S.C. § 1471(o) [(a)] (1970).	Violation of provisions and regulations.	Up to $1000 for each violation.
49 U.S.C. § 1474(a) (1970).	Violations regarding application of existing laws relating to foreign commerce.	$500/each offense.
FCC:		
47 U.S.C. § 202(c) (1970).	Common carrier—discrimination and preferences.	$500 each offense and $25 for each day of continuance of offense.
47 U.S.C. § 214(d) (1970).	Common carrier—extension of lines.	$100/day.
47 U.S.C. § 503(b) (1970).	Broadcast-stipulated violations.	Up to $1,000 per violation and total of not more than $10,000.
47 U.S.C. § 510(a) (1970).	Stipulated violations	Up to $100/violation and a total of not more than $500.
[The FCC enforces 6 other civil money penalty provisions.]		
EPA:		
42 U.S.C. § 1857F–4 [1857f–4] (1970).	Violation of provisions or regulations relating to interstate dealings in automobile and engines not meeting exhaust emission standards.	Up to $10,000.
42 U.S.C. § 1857d(j)(2) (1970).	Failure to submit reports	$100 per day.
33 U.S.C. § 1161(f)(2) (1970).	Violation of provisions and regulations of Federal Water Pollution Act.	Up to $5,000 [$8,000,000]
FHLBB:		
12 U.S.C. § 1425a(d) (1970).	Deficiency with liquidity requirements under the Federal Home Loan Bank Act.	Up to the highest rate of advances of one year, plus 2% per annum.
12 U.S.C. § [illegible]5b(b) (1970).	Violation of rule	Up to $100/per violation.
[The FHLBB enforces 4 other civil money penalty provisions.]		
FMC: 46 U.S.C. § 801 *et seq.* (1970).	Violation of statutory provisions.	Up to $5,000.

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments—Continued		
FRS:		
12 U.S.C. § 324 (1970).	Failure to make reports of conditions and of payment of dividends to Federal Reserve bank.	$100/day till submission.
12 U.S.C. § 334 (1970).	Failure to furnish reports from affiliates.	$100/day till submission.
12 U.S.C. § 374a (1970).	Acting as agent for non-banking borrower in making loans on securities to dealers in stocks, bonds, etc.	Up to $100/day.
12 U.S.C. § 377 (1970).	Affiliation with organization dealing in securities.	Up to $1,000/day.
12 U.S.C. § 1908(a) (1970).	Willful violation of any regulation under chapter 20, credit control.	Up to $1,000.
FTC:		
15 U.S.C. 45(*l*) (1970).	Violation of cease and desist order.	Up to $5,000/each violation; each day a violation.
15 U.S.C. 65 (1970).	Export trade, failure to supply required information.	$100/each day of failure.
15 U.S.C. 68d(b) (1970).	Wool products labeling, failure to maintain records.	$100/each day of failure.
15 U.S.C. 69f (1970).	Fur products labeling, failure to maintain records.	$100/each day of failure.
15 U.S.C. 21(*l*) (1970).	Violation of order of Commission.	Up to $5,000/each violation; each day a violation.
ICC:		
49 U.S.C. § 1 (12) (1970).	Failure to prorate	$100/each offense.
49 U.S.C. § 1 (17)(a) (1970).	Failure to comply with order.	$100–$500 for each offense and $50/day.
[The ICC enforces 10 other civil money penalty provisions.]		
SEC: 15 U.S.C. § 78ff(b) (1970).	Failure to file information, documents or reports.	$100 for each day.
SBA: 15 U.S.C. § 687g (1970).	Violation of any regulation or written directive requiring the filing of a report.	Up to $100/per day for each day of continuance.

And when it comes to the factor of deterrence, the existence of over 200 million citizens most of whom are law abiding and who daily conduct their business and personal affairs without the fear of jail time or being tagged a felon, we know the greater efficacy of the much milder and less potent sanction of loss of license, civil penalties and the like. Business is encouraged to comply with the law not only because that is what the law exacts but because failing to do so will bring down on the activity or purse noncriminal consequences.

[V] "Whether the behavior to which it applies is already a crime."[44] This fits

[Footnote 43 continued]

Agency–Citation	Purpose	Penalty
Executive Departments—Continued		
Postal Service:		
39 U.S.C. § 5206 (1970).	Failure to perform mail transportation services as required.	(a) up to $500 for each day the carrier refuses, (b) an amount the Postal Service deems reasonable, (c) deductions from compensation.
39 U.S.C. § 5603 (1970).	A common carrier by water fails or refuses to transport the mail.	Up to $500 for each day the carrier refuses.
49 U.S.C. § 1471(a) (1970).	Violation of regulations	Up to $1,000 for each such violation.

In addition, included below are several statutes providing for civil penalties which have been enacted since the compilation of Professor Goldschmid:

1. Ports and Waterways Safety Act of 1972, 46 U.S.C. 391a(11)(A) (1972 supp.).
2. Shipping Act amendments, 86 Stat. 653.
3. Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1319(d), 1320(d), 1321(b), (j)(2), 1322(j) (1972 supp.).
4. Revenue sharing (Act of Oct. 20, 1972), 26 U.S.C. § 6687(a) (1972 supp.).
5. Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136*l*-1 (1972 supp.).
6. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1375 (1972 supp.).
7. Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (a) (1972 supp.).
8. Bald Eagle Protection Act, as amended, 16 U.S.C. § 668(b) (1972 supp.).
9. Consumer Product Safety Act, 15 U.S.C. § 2069 (1972 supp.).
10. Endangered Species Act of 1973, 16 U.S.C.A. § 1540(a) (1974 supp.).

We note, however, that in only four of these instances does the agency whose regulations the defendant is accused of violating have the authority to itself impose a fine without a de novo review in the courts. These are the Immigration and Naturalization Service, OSHA, the Federal Home Loan Bank Board and the Postal Service.

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44. As to factor [V] the Supreme Court cited: *Lipke v. Lederer*, 1922, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061 (tax under Volstead Act levied against one charged with liquor viola-

squarely on the Government's side of the score board. Although two sections of OSHA provide that the same conduct may be subject to both civil and criminal sanctions,[45] the remaining civil penalties are the sole enforcement measures provided under the Act. Atlas argues, however, that as to corporate defendants who are not subject to imprisonment, the civil sanctions are effectively the same as the criminal fines. But except in the one instance we noted, this argument appears to be incorrect especially if we consider Atlas' case as an example. Atlas was charged with a serious violation carrying a mandatory penalty of up to a thousand dollars.[46] While we have no difficulty (as discussed later) in upholding the ALJ decision of violation, this record would not permit—and OSHRECOM does not assert—that the conduct of Atlas constituting a violation of the regulation would have permitted prosecution for criminal fines.

[3] Additionally, Atlas throws in the outworn argument that OSHA fails under the criminal vs. civil test because civil penalties are being imposed for what are essentially building code violations punishable by criminal sanctions under most state and municipal law. Now in the Twentieth Century it is too late to assert that there is anything improper in the election by Congress to impose its own sanctions—civil, criminal or both—without regard to its treatment by other components of our federalism.[47]

[VI] "Whether an alternative purpose other than punishment may rationally be ascribed to the sanction."[48] Actually,

tions held invalid because the sanction had the characteristics of a fine, not a tax); *United States v. La Franca*, 1931, 282 U.S. 568, 572-73, 51 S.Ct. 278, 75 L.Ed. 551 (the same holding); *United States v. Constantine, supra*, 296 U.S. at 295, 56 S.Ct. 223 (similar holding but condition of tax was commission of crime under state law).

45. 29 U.S.C.A. § 666(a).

§ 666. Civil and criminal penalties

(a) Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation. 29 U.S.C.A. § 666(e).

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

46. 29 U.S.C.A. § 666(b).

47. *Helvering v. Mitchell*, 1938, 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917.

48. The Supreme Court cited for factor [VI]: *Cummings v. Missouri*, 1866, 4 Wall. 277, 18 L.Ed. 356 (state could not require a priest to pledge that he had never attempted to avoid military service by entering or leaving the state as a precondition to administering the sacraments of his church); *Fong Yue Ting v. United States*, 1893, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (deportation held to be not punishment); *Hawker v. New York*, 1898, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (exclusion from practice of medicine following conviction for felony held to be an incident of State's power to protect health and safety, not additional punishment); *De Veau v. Braisted*, 1960, 363 U.S. 144, 157-60, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (disqualification of ex-felons from holding office in waterfront unions held within regulatory power of State to control union racketeering, not additional punishment); *United States v. Doremus*, 1919, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (provisions of Narcotic Drug Act for subjecting the sale

this factor is one which must be carefully restricted.[49] Unless caution is exercised, it puts the judiciary squarely in the middle of choices as to the kinds of remedies open and those most likely to achieve the legislative aim. What do Judges know about hazards of industry save what they see in the tragic case after the event of death or injury? Congress meant to put an end to the maiming or death of thousands. What facilities do Judges have for making inquiry into or evaluating what is the method best calculated to bring about the saving of life and limb?[50]

[4] [VII] "Whether the sanction appears excessive when compared with the alternative purpose assigned."[51] While this certainly is a subjective factor, it is one that Atlas' arguments fail to hurdle as well. The remedial functions obviously served by the civil penalties of OSHA may in many circumstances justify imposing the maximum penalties available under the statute. These penalties will often be reduced by the mitigating factors that the imposing agency must consider in assessing the penalty.[52] For example, Atlas' own $600 penalty represents a reduction of $400 after the Secretary had considered the gravity of the offense, the size of the business, the good faith of the employer and the history of previous violations. We cannot say that that penalty is excessive if in the considered judgment of the Administrative Agency it results in improved industrial practices that help to prevent future deaths from falls of employees of Atlas.

[5] The Supreme Court was conscious in *Kennedy v. Mendoza-Martinez* that the test it announced might point in divergent directions,[53] but each test was considered relevant to a determination of the character of a statute. While the

and distribution of drugs to official supervision and inspection held to have a reasonable relation to enforcement of special tax on sale and distribution of such drugs); *Child Labor Tax Case*, 1922, 259 U.S. 20, 43, 42 S.Ct. 449, 453, 66 L.Ed. 817, 820 ("* * * the provisions of the so-called taxi act must be naturally and reasonably adapted to the collection of the tax, not solely to the achievement of some other purpose plainly within state power.") *Lipke v. Lederer*, *supra*, 259 U.S. at 561–62, 42 S.Ct. 549 (attacks as a penalty when its primary function is to define and suppress crime rather than provide for the support of the government); *Trop v. Dulles*, *supra*, 356 U.S. at 96–97, 78 S.Ct. 590 (expatriation was held to have "no other legitimate purpose" than to punish); *Flemming v. Nestor*, 1959, 363 U.S. 603, 615, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (disqualification of specific deportees from eligibility for Social Security benefits while not lawfully in the Country held to bear rationale relation to the purposes of statute therefore not a penalty).

Admin.News, page 5177 (1970). [Senate Report No. 91-1282] (Minority Report).

50. *See generally Frank Irey, Jr., Inc. v. OSHA*, *supra*, — F.2d at page — and note 30 *supra*.

51. The Supreme Court cited for factor [VII]: *Helwig v. United States*, 1903, 188 U.S. 605, 610–12, 23 S.Ct. 427, 47 L.Ed. 614, 616 (an additional duty imposed for undervalued customs declaration greatly in excess of the maximum amount of regular duty); *United States v. Constantine*, 1935, 296 U.S. 287, 295, 56 S.Ct. 223, 80 L.Ed. 233, 238 (special excise tax of $1,000 for retail liquor dealers in business contrary to state law, compared with $25 excise tax for lawful dealers); *Rex Trailer Co. v. United States*, 1956, 350 U.S. 148, 154, 76 S.Ct. 219, 100 L.Ed. 149, 155 ($2,000 upheld as liquidated damages for fraudulent purchase of war surplus goods were it not so unreasonable or excessive as to convert the damages to a penalty).

52. 29 U.S.C.A. § 666(j).

53. *Supra*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d at 660–62.

civil penalties of OSHA are subject to scrutiny under several of these tests, taken as a whole, we think that Atlas has failed to demonstrate that Congress meant the statute to reprimand rather than regulate. The focus of the statute—the control of job site safety practices and health conditions—has a demonstrable and legitimate government concern. The fact that the civil enforcement sanctions are inherently disabilities does not alter the nature of the Congressional purpose.[54] And finally the Congressional purpose carefully to establish both civil and criminal sanctions and distinguishable procedures for imposing and reviewing them eliminate any question of Congressional intent. As Judge Friendly puts it.

> "When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word."[55]

For those reasons Atlas, despite its strenuous efforts to show the punitive character of OSHA, must fail on this issue.

III. The Seventh Amendment Challenge

[6] Failing the Sixth Amendment and Article III hurdle, Atlas further argues that even if the penalties are termed civil, the Seventh Amendment requires that Congress provide a system of enforcement that gives employers the opportunity to put their case before a jury in a de novo proceeding in the District Court.[56] As support, Atlas cites *United States v. J. B. Williams Co.*[57] in which the Second Circuit held that a defendant had the right to a trial by jury in an action brought by the Attorney General in the District Court under 15 U.S.C.A. § 56 for violations of an F.T.C. cease-and-desist order, and the dissenting opinion of Judge Gibbons in *Frank Irey, Jr., Inc. v. OSHA*, *supra*. *Williams*, however, is readily distinguishable for there the only means of statutory enforcement was by way of the federal courts. Where adjudicative responsibility rests only in the administering agency, "jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the [agency's] role in the statutory scheme." *Curtis v. Loether*, 1974, 415 U.S. 189, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260, 266; see also *Pernell v. Southall Realty*, 1974, 416 U.S. 363, 94 S.Ct. 1723, 40 L.Ed.2d 198. The Second Circuit in *Williams* was cognizant of this distinction and held merely that where the United States brings a traditional civil suit in the District Court juries must be provided.

That the civil sanction under attack is in the form of a dollar penalty is not a sufficient distinction to deny the power of Congress to prescribe an administrative, as distinguished from a judicial mechanism. To so hold would produce the absurd spectacle of Congress—having full power to prescribe an administrative structure with sanctions of denial

54. *Trop v. Dulles*, *supra*, 356 U.S. 97, 78 S.Ct. 590, 2 L.Ed.2d at 639–40.

55. *United States v. J. B. Williams Co., Inc.*, 2 Cir., 1974, 498 F.2d 414, 421.

56. Although this issue was not clearly specified in Atlas' excellent brief, we conclude that since it was vigorously urged on oral argument and Atlas filed a motion in the administrative proceedings demanding a jury trial (see note 6, *supra*) it would be overly technical to conclude that the issue was not before us.

57. *Id.*

or revocation of a life-or-death license (see the large number of such statutes at note 43, *supra*)—being denied the power to prescribe a money fine of a single dollar or for that matter a single red sou.

IV. Due Process Issue

[7] Atlas objects to the provisions of 29 U.S.C.A. § 659(b) that—in the absence of a challenge by the employer—allows the Secretary's citation and penalty to become the final order of OSHRECOM. The argument is that the employer's affirmative burden to initiate the adversary proceedings violates due process.[58] In support, Atlas cites *Bell v. Burson*, 1971, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; *Goldberg v. Kelly*, 1973, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; *Sniadach v. Family Finance Corp.*, 1969, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349. But Atlas misunderstands the focus of these decisions. The essence of the *Sniadach* cases is not that the "aggrieved" person had to shoulder the burden of securing a hearing but that the detriment occurred *first* before *any* opportunity for a meaningful hearing was afforded. Thus the question is—are there detriments imposed on employers under OSHA prior to the timing of the hearing? Arguably, had we accepted Atlas' criminal penalties contention, the Secretary's citation itself could be said to carry criminal stigma but we have rejected that argument. Consequently, the only real detriment to the employer is the monetary penalty which is only imposed after there has been an opportunity to be heard.

The Deep Freeze How Chilling?

[8] Last among its constitutional challenges, Atlas argues that the overall penalty structure of OSHA violates due process because it "chills" the employer's right to seek review of the citation penalty. Arguably, it does this in two ways: First, on review the OSHRECOM has authority to increase the penalty in consideration of such factors as ". . . the good faith or the employer . . ."[59] Thus, the OSHRECOM could theoretically use this power in the same "vindictive" manner forbidden by the Supreme Court in *North Carolina v. Pearce*[60] to punish by penalty increases under the bad faith rubric those employers who exercise their right to review. Second, the possibility that—absent a stay—penalties

58. This contention was impliedly rejected in *Yakus v. United States*, 1944, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 where the Supreme Court held that §§ 203 and 204 of the Emergency Price Control Act of 1942, 50 U.S.C.A. App. § 924, that allowed challenges to the validity of regulations to be raised solely by protest to the Administrator and not as a subsequent defense to a criminal prosecution for violation of the regulations. After finding that the procedure allowed sufficient time and opportunity to present evidence the Court restated the basic concept of constitutional waiver:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; *Barbour v. Georgia*, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; *Whitney v. California*, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180, 86 A.L.R. 174.

59. 29 U.S.C.A. § 666(i).

60. 1969, 395 U.S. 711, 725, 89 S.Ct. 2072, 23 L.Ed.2d 656.

will cumulate with each violation being considered a separate one for the entire period of the appeal if OSHRECOM finds that an earlier appeal to OSHRECOM or the Court of Appeals was not in good faith or solely for the purposes of delay or avoidance of penalties. 29 U.S.C.A. § 666(d). We do not reach this for Atlas was not penalized by either of these provisions and under no circumstances could we on this record and briefs which represent the finest in quality and content conclude or even sustain a post-affirmance effort by the Secretary to find this appeal to have been ill-founded, even if to the advocate remaining still unconvinced, the effort was unavailing in result. Atlas therefore simply has no standing to challenge these aspects of the statute. *Sierra Club v. Morton*, 1972, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636.

V. The Administrative Findings

Finally, Atlas challenges the administrative determination that at the time of the accident its roof hole coverings violated either the statute or the regulations. In the alternative Atlas contends: (i) that its means of hole covering complied with the intent of the statute which required that the coverings be ". . . so installed as to prevent accidental displacement";[61] (ii) the findings of the administrative hearing officer were not supported by substantial evidence; or (iii) even if the regulation was violated, no "serious" offense qualifying for civil penalties under 29 U.S.C.A. § 666(b) and (k) actually resulted from the means of hole coverings used.

[9] The ALJ determined that the opening covers used by Atlas—two bundles of insulation material of the same type then being laid over the roof by the Atlas employees—did not meet the requirements of the regulation that they be "so installed as to prevent accidental displacement." However, Atlas urges that the regulatory phrase was intended only to encompass an advertent dislodging of the cover—an assertedly unlikely possibility here—but not an inadvertent removal of unsecured insulation by an employee who thought it was merely one of the many bundles of insulation scattered over the solid roof deck. Reading the statute with its safety objectives in mind, we cannot accept any such distinction. The Administrative Agency had ample basis to conclude that Atlas' method of covering the roof openings fits well within the language of the regulation.

It was a jury-rigged system which failed with the price of a human life. We are not, nor would we wish to be, and our own system would suffer if we were, infused with "roofing prescience" to enable us to conclude, as Atlas urges, that the possible confusion by this temporary employee between these hole-covering bundles and those strewn around the roof deck was "accidental."

[10] Finally, the result—death—answers fully the contention that there was no "serious violation" of 29 C.F.R. § 1926.500(b)(1) committed resulting in a civil penalty under subds. (b) and (k) of 29 U.S.C.A. § 666. Atlas cites the exception to § 666(k) that excludes from a "serious violation" a situation where the employer "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Essentially, this was a question of fact for which the administrative triers had ample basis to conclude that Atlas should have known of the presence of the violation.

Affirmed.

61. 29 C.F.R. § 1926.500(f)(5)(ii).

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-2249

OSCHRC No. 1130

ATLAS ROOFING COMPANY, INC.,
Petitioner,

versus

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, UNITED STATES DEPARTMENT OF LABOR
Respondent.

Petition for Review of an Order of the Occupational Safety and Health Review Commission (GEORGIA CASE)

Before BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Atlas Roofing Company, Inc. for review of an order of the Occupational Safety and Health Review Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Occupational Safety and Health Review Commission in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

September 8, 1975

Issued as Mandate:

APPENDIX B

SECRETARY v. ATLAS ROOFING COMPANY

OSAHRC Docket No. 1130 May 7, 1973

BRADY, JUDGE, OSAHRC: This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 USC 651 *et seq.* (hereinafter referred to as the Act) to contest a citation issued by the Secretary of Labor (hereinafter referred to as the Secretary) pursuant to Section 9(a) of the Act. The citation which was issued June 15, 1972, alleges that as the result of an inspection of the respondent's workplace at Jabco Warehouse No. 4, Granite Road, Arrowwood Industrial Park, Charlotte, North Carolina, respondent violated section 5(a)(2) of the Act by failing to comply with specific occupational safety and health standards promulgated by the Secretary pursuant to Section 6 thereof. A notice of proposed penalty was issued with the citation.

The Secretary alleges that on June 6, 1972, respondent violated the standard codified in 29 CFR 1926.500(b)(1). The hearing was held on November 2, 1972, in Charlotte, North Carolina, and no additional parties sought to intervene in the proceeding.

STATEMENT OF THE CASE

Atlas Roofing Co., Inc. is a corporation having a place of business at Moreland Avenue, No. 42 Highway, P.O. Box 18211, East Atlanta Station, Atlanta, Georgia, and is a business affecting commerce within the meaning of the Occupational Safety and Health Act of 1970 (Tr. 4).

On June 6, 1972, respondent was engaged in roofing the Jabco Warehouse No. 4, at Arrowwood Industrial Park, Charlotte, North Carolina. At the time and place in question, there were five employees of respondent, and six temporary employees hired through Help Unlimited to assist in the roofing operation, all of whom were under the supervision of respondent's foreman (Tr. 4-5).

In the process of roofing Bay No. 3 of Jabco Warehouse No. 4, a temporary employee fell through a roof opening to his death, approximately thirty feet below (Tr. 43) (Ex. 4).

ISSUES

The issues to be determined in this proceeding relate to whether the aforementioned standard has been violated. If such a violation has occurred, the question arises as to whether the violation was of a serious nature under the criterion of Section 17(k) of the Act. If respondent is adjudged in violation of the standard as alleged, then a determination must be made as to whether the penalty proposed is appropriate.

MOTIONS

The respondent moves to dismiss the Complaint and Citation for the following reasons.

(1) The Safety and Health Regulations for construction were improperly adopted by the Secretary.

(2) The complaint is not based upon a proper citation.

It is contended by respondent that the construction standards prescribed in 29 CFR Part 1926 (formerly 29

CFR Part 1518), and adopted by the Secretary as Occupational Safety and Health Standards pursuant to Section 6(a) of the Act, are invalid and therefore are of no force or effect in this proceeding. Respondent argues that although Section 6(a) allows the Secretary to promulgate "established Federal standards," such standards must have been in effect on the day of enactment of the Occupational Safety and Health Act.

The standards in question were established by the United States Department of Labor, and became effective April 24, 1971, prior to the effective date of the Occupational Safety and Health Act, but subsequent to its enactment. Section 3(10) of the Act defines the phrase "established federal standard" as meaning "any operative occupational safety and health standard established by an agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act."

In questioning the validity of the standards which form the basis of this proceeding, respondent places an erroneous interpretation on the phrase "presently in effect," as contained in section 3(10) of the Act. Although the phrase "presently in effect" is not defined in the Act, it must be construed to mean standards in force and effect on the effective date of the Act, April 28, 1971. Reading Section 3(10) in context with related sections of the Act, provides ample support for this view. Section 4(b)(2) provides "...Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be Occupational Safety and Health Standards issued under this Act, as well as under such other Acts."

Accordingly, Section 4(b)(2) shows the Congressional intent that the effective date of the Act governs in determining whether Federal Standards are

"established" within the meaning of the Act. Also, in the latter part of Section 3(10) it is stated that standards in any act of Congress would be effective "on the date of enactment of this Act," distinguishing from those standards established by any agency of the United States "presently in effect." Further, Section 6(a) of the Act, which provides the statutory authority for the Secretary to promulgate standards, states that the Secretary may promulgate such standards commencing with the effective date of the Act.

Therefore, it would be a gross inconsistency to hold that the Secretary cannot promulgate standards "in effect" on the effective date of the Act, but require that such standards be in effect on the date of enactment of the Act only.

The Federal Standards in effect regarding construction were legally promulgated by the Secretary as Occupational Safety and Health Standards pursuant to Section 6(a) of the Act. Hence, the standards alleged to have been violated by the respondent were in effect on the date of the inspections herein.

After the Citation was issued, a Notice of Contest was duly filed initiating this proceeding. The Complaint was filed on July 17, 1972, and respondent's answer was filed July 24, 1972.

The Complaint alleged in part as follows:

"The Citation for Serious Violation, 29 CFR § 1926.500(b)(4), is hereby amended by changing 29 CFR §1926.500(b)(4) to 29 CFR §1926.500(b)(1) so that it is alleged on or about June 6, 1972, respondent violated 29 CFR §1926.500(b)(1) [formerly 29 CFR §1518.500(b)(1)]."

Respondent maintains that it is the citation issued by the Secretary that forms the basis of all legal proceedings against the employer before the Commission. It is asserted that the citation contains the

alleged violation to which the employer must file his notice of contest, and it is the citation which causes the employer to become liable for penalties under Section 17 of the Act. Further, under Section 10(c) of the Act, the Commission's final order is based upon the Secretary's citation which had been issued to the employer.

Thus, respondent contends that since the entire cause of action against the employer is the result of the citation, a complaint cannot be properly amended without the issuance of a new citation.

In response, complainant points out that the respondent denied all material allegations of the Complaint in its answer, and not until the day of the hearing approximately three months later, did respondent raise the question of the amendment. It is contended that the notice requirements of Section 9(a) of the Act do not impose such an inflexible burden on the Secretary, that a citation which gives fair notice of the nature and basis of the allegation, cannot be amended by substitution of regulation section numbers in the complaint.

A review of the evidence discloses that respondent was not prejudiced in defending this action by the amendment, and was not misled or surprised in any manner to its detriment. This is particularly true since the answer was timely filed and no question of the amendment was raised until the time of the hearing. On the face of the Complaint, it is obvious what the Secretary was undertaking to do, and the due process requirement of clear notice and opportunity to adequately defend, has certainly been met.

Therefore, the amendment was proper under the circumstances, and the Motion to Dismiss is denied.

ALLEGED VIOLATION OF 29 CFR 1926.500(b)(1)

Section 1926.500(b)(1) provides in pertinent part, as follows:

> Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

Complainant's witnesses testified that there were no guardrails used to guard the openings prior to the accident (Tr. 16). This testimony is not in dispute, and respondent's witness confirms that guardrails were first placed about the openings subsequent to the accident (Tr. 55).

There is uncontroverted testimony that the roof openings in question measured approximately three feet by three feet (Exh. 1) (Tr. 40). The testimony, however, is in conflict as to whether a roof opening in bay No. 3 was covered, on June 5, 1972, the date of the accident. Three witnesses for complainant testified that an opening was not covered (Tr. 13, 23, 29). The Compliance Officer testified that some of the persons he interviewed stated the openings were covered, some said they did not know, and some thought maybe they were, and some said they were not (Tr. 37).

The respondent's foreman testified that each opening was covered with two bundles of insulation that weighed approximately 60 pounds each, measured three feet by four feet in size, and that each one could support the weight of three men (Tr. 40) (Tr. 41). He further stated that after Mr. Bozeman (the deceased) had fallen through the opening he personally covered it with the insulation (Tr. 52).

It was also indicated that in the process of roofing, the bundles of insulation to be used for actual roofing purposes would be stacked four to five bundles high,

and approximately 10 to 15 feet apart. (Tr. 72) The foreman revealed that specific instructions were given to the temporary employees not to move the bundles of insulation over the openings while working on the roof (Tr. 42). Further, Mr. Bozeman was assigned to operate the hot machine, which was used to place hot tar upon the roof, and that his job had nothing to do with the insulation (Tr. 42).

In defense of the allegations by the complainant, respondent undertakes to show that the bundles of insulation described were sufficient to meet the Secretary's requirements for opening covers. However, Mr. John W. McMillan, Compliance Officer, for the Department of Labor testified that the bundles were about nine inches thick, and that "I wouldn't stand on one over those holes," in referring to a bundle of insulation (Tr. 36).

It is contended that if any covers were removed, it was the result of the deceased employee disregarding specific instructions against such removal. Respondent argues that under Section 17(k) of the Act, the employer cannot be cited for a serious violation if he did not or could not, with the exercise of reasonable diligence, have known about the presence of a violation.

As previously pointed out, the testimony is in direct conflict as to whether a roof opening was covered in bay No. 3. Under the circumstances perhaps complainant's witnesses had no specific occasion to observe over-head openings, however, there is no reason to doubt their testimony regarding light shining through the roof. Johnny Chambers testified that upon arriving at work in bay No. 3, he saw the sunlight through a roof opening and he stood in the sun a minute to warm up before starting work. This was at approximately 7:30 a.m. on the date of the accident herein (Tr. 29).

While the complainant maintains that the roof opening was not covered prior to the accident, it is admitted by respondent that the alleged covers were displaced at the time thereof.

Although the burden of proof rests with complainant in this proceeding, since it has been shown that guardrails and toeboards were not in use, it becomes incumbent upon respondent to establish that the use of opening covers is in compliance with the applicable standard.

Section 1926.500(b) does not specifically set forth that it has application to roofs, however, the general provision of the section, found in paragraph (a), contains reference to employees or materials falling through "roof" openings.

Paragraph (b) provides that covers for openings shall meet the specifications found in paragraph (f) of the Section. Paragraph (f)(5)(2) states in part as follows:

> The floor opening cover shall be capable of supporting the maximum intended load and so installed as to prevent accidental displacement.

The interpretation placed upon the foregoing requirement is determinative in resolving a key issue in this proceeding. In considering all of the factors in this case it must be held that even if the bundles of insulation were used for opening covers as alleged, the insulation failed to meet the requirement of "being so installed as to prevent accidental displacement."

The testimony shows that six temporary employees had been hired for the job who were without previous experience. They had been working approximately 3 hours prior to the accident herein. Further, in the process of roofing, the insulation which was used for insulating purposes, was taken from various bundles of the same type and description as insulation allegedly

used for opening covers. In fact, respondent's witness testified that bundles of insulation were "scattered all over the roof" (Tr. 42).

There is no question that an alleged cover was displaced at the time of the accident. Although the fact that the accident occurred does not necessarily mean that there was a violation, in this case it is noted that the employer retained full control over the conditions which gave rise to the violation.

Since, according to respondent, the alleged cover had been moved, there has been no showing as to how such cover was displaced nor when it was displaced. The standard does not specify the type of material required for an opening cover, but it is specific in that the cover must be so installed as to prevent accidental displacement.

It is abundantly clear from the facts that the described insulation used as alleged opening covers could have been accidentally displaced by an employee while acting free of fault or negligence, and in the performance of his duties. This is particularly true with reference to the temporary inexperienced employees, working amid stacks of insulation on the roof as described. It therefore cannot be held that under such circumstances bundles of insulation used as opening covers, would be so "installed" as to prevent accidental displacement. Respondent's argument that the alleged cover was removed as a result of an employee's misconduct is untenable. The facts do not bear out how such cover was removed, much less a showing of misconduct by an employee. Respondent has failed to meet the requirements of paragraph (f)(5)(2) because it has not been shown that if opening covers were used, they were installed in a manner as to prevent accidental displacement.

In view of the foregoing, and the fact that the

respondent did not use standard railing and toeboards, it is held that Section 1926.500(b)(1) was violated as alleged by complainant.

Appropriateness of Penalty

The authority to assess civil penalties under the Act resides exclusively with the Commission. The Commission, in Section 10(c) of the Act, is charged with affirming, modifying or vacating citations issued by the Secretary under Section 9(a), and notifications issued and penalties proposed by the Secretary under 10(a) and 10(b).

In determining the appropriate penalty, the Commission under Section 17(j) of the Act is expressly required to give "due consideration" to the size of the employer's business, the gravity of the violation, good faith of the employer, and history of previous violations, in determining the assessment of an appropriate penalty.

The Secretary's compliance officer testified that the factors considered before proposing the penalty in the amount of $600.00, was good faith, size, and history of previous violations. Commencing with $1,000, the amount of the penalty authorized under the Act for serious violations, a 10% reduction was allowed for good faith, as there was some safety awareness indicated but there wasn't a good safety program. Also, 10% was allowed for size as there was less than 19 employees, and 20% was allowed for history as there were no previous violations.

The record does not disclose what specific consideration was given to gravity of the violations by the Secretary. In *Nacirema Operating Company, Inc.*, OSHRC Docket No. 4, the Commission pointed out that the four criteria provided under Section 17(j)

cannot always be given equal weight, however it was indicated that the principal factor to be considered is the gravity of the offense. The Commission stated in *National Realty and Construction Co., Inc.* OSHRC Docket No. 85, that the elements to be considered in determining the gravity of a violation to be: (1) the number of employees exposed to the risk of injury; (2) the duration of the exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of an injury. Weighing all of these factors in light of the circumstances, it is concluded that the proposed penalty in the sum of $600.00 is appropriate and reasonable based on the facts of this record.

Motion to Supplement Record

At the conclusion of the hearing the record was closed but subject to being reopened on motion to receive testimony of one Erwin Griffin, a former temporary employee of respondent.

On December 26, 1972, respondent filed a Motion to Supplement Record. Respondent offered as evidence a copy of a purported statement dated June 7, 1972, of Erwin Griffin, and a copy of an Attending Physicians Report, before the North Carolina Industrial Commission, dated June 29, 1972.

Complainant objects to the admissibility of the documents as they are not shown to be newly discovered, and constitute inadmissible heresay statements.

The documents offered as evidence in this proceeding are unauthenticated copies, which could not be held as admissible evidence in the ordinary course of the hearing. It is indicated that upon diligent search the evidence was discoverable by respondent

prior to the hearing, and thus would have afforded complainant an opportunity for cross-examination.

The documents offered by respondent have not been shown to be credible and must be held inadmissible as violative of Rule 72 of the Commission's Rules.

Findings of Fact

1. Atlas Roofing Company, Inc., is a corporation doing business at Moreland Avenue, #42 Highway, Atlanta, Georgia, where it is engaged in the business of roofing construction.

2. On June 6, 1972, respondent was engaged in the roofing of Jabco Warehouse No. 4 at Arrowwood Industrial Park, Charlotte, North Carolina.

3. On June 8, 1972, an authorized representative of the Secretary conducted an inspection of the above worksite at Arrowwood Industrial Park, Charlotte, North Carolina. As a result of the inspection, on June 15, 1972, a citation for an alleged serious violation was issued, with notice of proposed penalty.

4. On June 6, 1972, there were five regular employees and six temporary employees of respondent working on the roof of bay No. 3 at Jabco Warehouse No. 4 as aforementioned.

5. In process of roofing bay No. 3, roof openings were not guarded by standard railing and toeboards prior to the accident on June 6, 1972.

6. On June 6, 1972, a roof opening over bay No. 3 was not covered.

7. On June 6, 1972 there was substantial probability that death or serious physical harm could result to respondent's employees working on the roof under the aforesaid conditions.

8. The proposed penalty issued herein was

determined in accordance with the administrative guidelines of the Secretary and is found to be reasonable and appropriate.

CONCLUSIONS OF LAW

1. Atlas Roofing Company, Inc., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein, pursuant to 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with safety and health regulations promulgated by the Secretary pursuant to Section 6(a) of the Act.

3. Respondent was in violation of 29 CFR 1926.500(b)(1) on June 6, 1972, as charged in the amended citation. The violation constituted a serious violation within the meaning of Section 17(k) of the Act.

4. A penalty of $600.00 is assessed for the serious violation contained in the amended citation.

5. Respondent failed to comply with the regulations set forth above which is contained in the amended citation, thereby violating Section 5(a)(2) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record it is

ORDERED

1. That the amended citation and proposed penalty for violation of 29 CFR 1926.500(b)(1) is affirmed and a penalty in the amount of $600.00 is assessed. □